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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 470, 472

ILLINOIS COMMERCE COMMISSION, et al., etc.,
Petitioners,

vs.

GREAT LAKES ELEVATOR CORPORATION, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR PETITIONERS, DANIEL F. RICE & CO., A PARTNERSHIP

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Petitioners.

January 6, 1947.

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OPINION BELOW

The opinion of the Circuit Court of Appeals for the Seventh Circuit is reported in 156 Federal 2nd, page 33.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Seventh Circuit sought to be reviewed was entered on June 7, 1946. (R. 126) Petition for Writ of Certiorari was filed September 6, 1946, and was granted October 21, 1946. The jurisdiction of this court is invoked under Section 240 of the Judicial Code of the United States, as amended. (Tit. 28 U.S.C., Sec. 347) The validity of provisions of the Illi-

nois Public Utilities Act and Article XIII of the Illinois Constitution are attacked on the ground of alleged repugnance to federal statutes.

The federal statutes involved are the United States Warehouse Act (Tit. 7 U.S.C., Sec. 241 et seq.) and Section 5a(7) of the Commodity Exchange Act (Tit. 7 U.S.C., Sec. 7a(7)), both set forth in Appendix A (*infra* pp. 71-80). The state act involved is the Illinois Public Utilities Act (*Ill. Rev. Stat.* 1945, Ch. 111⅔). The state act concededly provides expressly and in detail for comprehensive utility regulation of warehousing rates, practices, services and financial transactions. For the convenience of the court, a pamphlet copy of the Illinois Public Utilities Act accompanies this brief.

STATEMENT OF THE CASE

On July 28, 1944, Daniel F. Rice & Co.,[1] a grain commission merchant on behalf of its customers as farmers, grain dealers and processors, filed a complaint with the Illinois Commerce Commission[2] against public grain warehousemen in the Chicago terminal area. These public warehouses are defined as, and are, public utilities under the state statute. (*Ill. Rev. Stat.* 1945, Ch. 111⅔, Sec. 10(a)) Rice and its customers for some years past have been customers of such warehousemen, storing grain in their elevators and paying storage charges thereon.

The Rice complaint charged these warehousemen with maintaining excessive, unreasonable and discriminatory rates and practices, with operating inadequate and unsafe facilities and service, with abandoning public service at will,

[1] An Illinois partnership, hereinafter referred to as "Rice".

[2] An administrative board established under the Illinois Public Utilities Act with comprehensive regulatory powers over public utilities. Hereinafter referred to as "Illinois Commission".

and with numerous violations of specific state statutory provisions and state constitutional requirements. (R. 19-22) The relief prayed was an inquiry, investigation, hearings and the entry of orders and directives which would:

1. Fix and establish just, reasonable, non-discriminatory and non-preferential rates and charges for the public storage of grain.
2. Prohibit and eliminate discriminatory practices effected by warehousemen to their own advantage, and in discrimination against the public, such as:
   a) Mixing grain in storage so as to retain for the warehouseman's own use the highest quality grain, while delivering to public storers the very bottom of the contract grade.
   b) Trafficking in transit billing or arbitrarily withholding desirable billing from public storage customers.
   c) Manipulating and rebating storage charges to effect grain sales and preferences.
   d) Manipulating the use of preferred storage space so that public storers of grain are obliged to store in old wooden warehouses carrying exorbitant insurance rates.
   e) Delaying the loading out of grain to further the warehouseman's own sales—or prevent the removal from storage of public grain paying excessive storage charges.
3. Enforce the state constitutional prohibition against public warehousemen occupying the dual and conflicting positions of public grain warehousemen and at the same time grain dealers and merchandisers in direct competition with their storage customers.
4. Prescribe and establish reasonable, safe and adequate public grain warehouse service and facilities.
5. Prevent the unwarranted abandonment of public grain warehouse service and facilities without Illinois Commission approval.

5. Enforce the state statutory provisions requiring the prior approval of the Illinois Commission before:

   a) Securities are issued.

   b) Financial, operating and other similar contracts are entered into between the public warehouse and its affiliates.

   c) Contracts are entered into with other utilities or agreements made for the sale, lease or transfer of warehousing properties, or for the diversion of utility funds. (R. 23-4)

The Rice complaint to the Illinois Commission joined the Board of Trade of the City of Chicago as a defendant, to the end that the improvements sought in warehousing practices could be in part achieved through Board of Trade rules.[3] (R. 23, 24)

A motion to dismiss the proceedings was filed with and denied by the Illinois Commission, and the cause set for hearings commencing October 24, 1944. (R. 25-8) Thereupon, several of the warehousemen who possess licenses issued under the United States Warehouse Act filed a bill in the District Court of the United States, to enjoin: a) the members of the Illinois Commission from conducting hearings or entering orders in the cause, b) the Attorney General of Illinois from instituting any proceedings against the warehousemen for alleged violation of state statutes, and c) Rice from further prosecuting its complaint. The injunction was sought on the ground that the federal government, by the United States Warehouse Act and the Commodity Exchange Act has "preempted and occupied

[3]The Board of Trade sought an injunction in a separate proceeding. Review of the Circuit Court of Appeals' judgment in that companion case has been granted in No. 471, 473, October Term, 1946, *Illinois Commerce Commission, et al.* v. *Board of Trade of the City of Chicago.*

the field of regulation" over federally licensed public warehouses, to the "exclusion of any similar regulation" by Illinois. The validity of state authority was attacked on the ground that federally licensed warehouses were subject "solely to regulation" by the federal government. (R. 7, 8)

Three of the warehouse defendants before the Illinois Commission did not join in the federal injunction proceedings. Two of these non-participating defendants were state licensees and the third held a federal license. (R. 18)

Motions to strike the complaint for injunction and dismiss the proceedings were filed by the Attorney General of Illinois and by Rice. (R. 36-48) Such motions were allowed and an order entered on June 26, 1945, dismissing the complaint. The District Court found that:

1. The United States Warehouse Act is not a utility regulatory act, but a limited and circumscribed exercise of federal control over warehousemen who voluntarily seek and obtain a federal license.
2. The federal act does not authorize the exercise of affirmative regulatory authority over the specific issues raised by the Rice complaint, nor does it permit the grant of relief sought before the Illinois Commission.
3. State regulation over federally licensed warehouses has not been preempted, excluded or superseded. (R. 88-93)

Appeals were taken to the Circuit Court of Appeals for the Seventh Circuit, and on June 7, 1946, that court reversed the District Court and remanded, with directions to overrule the motions to strike the complaint. (R. 126)

The opinion of the Circuit Court of Appeals will be discussed at appropriate stages of our argument.

SPECIFICATION OF ERRORS TO BE URGED

1. The Circuit Court of Appeals for the Seventh Circuit erred in holding:

a) That state authority and control may be invalidated and superseded by reason of federal regulatory authority implied and not expressly delegated.

b) That the state's comprehensive rate making power over public grain warehousemen has been superseded and that the federal agency has authority to determine rates.

c) That the state's comprehensive authority to order and direct the elimination of discriminatory practices by public grain warehousemen has been superseded.

d) That the state constitutional prohibition against a warehouseman occupying the position of public trust as a public warehouseman, and at the same time the conflicting position of a merchandiser and dealer in grain is invalid.

e) That the affirmative state regulatory authority which provides for safe and adequate public warehousing service and facilities and prevents the unwarranted abandonment of such service, has been superseded as in direct conflict with any authority over such grain warehouses delegated by Congress to a federal agency.

f) That the state requirements with respect to commission approval of contracts with affiliates, with other public utilities, and approval before securities may be issued cannot be exercised over public grain warehousemen, on the ground that the Secretary of Agriculture "has implied authority" to deal with such matters.

2. The Circuit Court of Appeals for the Seventh Circuit erred in holding that the comprehensive state utility regu-

lation of public grain warehousemen with respect to rates, practices, services and affiliate, securities and financial transactions is in conflict with, or plainly and palpably infringes the policy of the limited control provided by the United States Warehouse Act, as enacted in 1916 and finally amended in 1931, or with the Commodity Exchange Act.

3. The Circuit Court of Appeals for the Seventh Circuit erred in holding that public grain warehousemen performing public utility services in Illinois are completely exempt and immune from state regulation, and subject exclusively and solely to federal control because they have applied for and received a permissive or voluntary federal license.

4. The Circuit Court of Appeals for the Seventh Circuit erred in reversing the order of the District Court of the United States for the Northern District of Illinois, Eastern Division.

SUMMARY OF ARGUMENT

I

Ever since the decision of this court in *Munn* v. *Illinois*, 94 U.S. 113 (1877), the regulation of public grain warehouses has been a matter of the local and domestic concern of the states. At present, forty-one states provide some form of regulation of warehouses. The relief sought by respondents in this case would result in the supersedure of such regulation.

This court will not hold that Congress intends to invalidate or suspend the exercise of the reserved powers of the states unless its purpose to do so is clearly manifested. Supersedure will result only where there is a precise coincidence of state and federal control of the particular subject matter of regulation or where there is such actual and positive conflict and inconsistency between the two systems that state control cannot be reconciled with federal action. A general delegation of authority to a federal agency will not result in supersedure of state laws unless and until that agency takes some action or makes some order which actually conflicts with existing state regulation.

These fundamental and well-established rules were not applied by the Circuit Court of Appeals in this case. Instead, that court held that Congressional action in any part of the field relating to warehouses prevents the exercise of any state regulation of such utilities. The court below did not determine that Congress clearly manifested an intention to regulate for itself, that the state regulatory functions invoked have been expressly delegated to and exercised by the Secretary of Agriculture,[4] or that actual and irreconcilable conflict existed. In the absence of such findings, there is no ground for striking down the state regulation here involved.

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[4]Hereafter sometimes referred to as "secretary."

II

The United States Warehouse Act is limited and circumscribed in its provisions, scope and purpose. It is primarily a warehouse receipt act, providing no affirmative public utility regulation. Even as to the narrow authority granted, the only control which the secretary may exercise is negative—the revocation of voluntarily acquired licenses and the publication of findings. The acquisition of such licenses under the federal act is wholly permissive and voluntary. No license is required, even of an exclusively interstate house. The result of the opinion of the Circuit Court of Appeals is to permit a warehouseman to avoid and flaunt affirmative state utility regulation by his own voluntary act of acquiring a federal license.

The secretary, under the federal act, possesses no affirmative regulatory powers over such licensees. He cannot grant any of the relief sought before the Illinois Commission. The act provides only a "measure of control" and expressly sanctions co-existing state authority.

The 1931 amendment to the act granted the secretary exclusive control as to the limited and circumscribed power, jurisdiction and authority expressly granted by the act. The purpose of these amendments was to further the value of federal warehouse receipts.

III

The federal act is completely silent concerning each of the major issues of regulation concerning which Rice has invoked the authority of the Illinois Commission. The Illinois Public Utilities Act, on the other hand, contains specific and comprehensive provisions concerning regulation of each of the issues presented. As the Circuit Court of Appeals recognized, the United States Warehouse Act

contains no provisions requiring prior approval of contracts and arrangements with affiliates and other utilities, sales, leases, and encumbrances of utility properties or the issuance of securities. In the absence of such provisions in the federal act, state authority may not be nullified.

The secretary has been delegated no authority to establish and determine just and reasonable rates. In the absence of specific language delegating such authority, such powers cannot be exercised. The secretary may only revoke a voluntary license if exorbitant storage rates are charged. The Illinois Commission, however, has detailed and positive statutory rate-making power. Following the establishment of a rate by the Illinois Commission, full compliance with the federal requirements is achieved by filing a schedule of the rates so ordered with the secretary. Thus, there is no conflict between the two systems. The assumption by the court below that the Illinois Commission, despite its elaborate statutory machinery and expert utility regulatory staff, might fix a rate which the secretary would find exorbitant is unjustified, but in any case, supersedure is not to be determined on the basis of remote and speculative possibilities.

The state constitutional prohibition against an individual occupying the dual and conflicting positions of a public grain warehouseman and a grain dealer in no way conflicts with provisions of the United States Warehouse Act. The federal act does not authorize such a practice but does require that if the warehouseman has an interest in the grain for which a receipt is issued, that fact should be noted on the receipt for the protection of receipt holders.

Discriminatory rates and practices of a serious, unethical and unbusinesslike character may be prevented by the Illinois Commission, while under the federal act, no such

result may be reached. The latter act only forbids discriminations in the receipt of grain for storage.

The Illinois Commission is empowered to order and compel the establishment of safe, adequate, and efficient grain warehousing service and facilities, whereas under the United States Warehouse Act the secretary may go no farther than to ascertain that a particular warehouse for which a license is sought is suitable for storage of the particular commodity concerned. The secretary has no power to order a licensee to correct, improve or change his services and facilities.

The public interest in the prevention of unwarranted abandonment of public grain warehousing service and capacity is protected by the Illinois statute. The federal act permits service to be abandoned and the license surrendered without penalty.

Respondents have made no showing of the existence of federal authority over the matters of regulation concerned or of an irreconcilable conflict between state and federal provisions. Therefore, under established principles of supersedure, state regulation must be sustained. There is no question of exposure to dual regulation or penalties presented in this case. To nullify state control would be to free warehousemen from any effective regulation. This result could not have been intended by Congress.

ARGUMENT

I

FEDERAL NULLIFICATION OF STATE AUTHORITY RESULTS ONLY WHERE A PRECISE COINCIDENCE OF REGULATION OR AN IRRECONCILABLE CONFLICT IS CLEARLY DEMONSTRATED.

A. Public grain warehouses are matters of local and domestic concern, traditionally subject to regulation by the states.

The public grain warehouses involved are situated and their business carried on exclusively within the state of Illinois. In response to the pressures of the Granger movement, the Illinois Constitution of 1870, by a separate article devoted entirely to the subject of grain warehouses, and the statutes of Illinois enacted the following year, provided for state regulation of public warehouses. The constitutionality of such regulation, and particularly the right of Illinois to fix warehouse charges, was attacked by Chicago warehousemen, and culminated in the famous case of *Munn* v. *Illinois*, 94 U.S. 113 (1877), where the concept of businesses "affected with a public interest" had its American origin.

In the *Munn* case the court held that regulation of public grain warehouses "is a thing of domestic concern". Following that decision, this court has repeatedly recognized that regulation of public warehouses is a matter of local and domestic concern. Thus, in *Townsend* v. *Yeomans*, 301 U.S. 441, 458 (1937), state regulation of Georgia tobacco warehouses was upheld as in furtherance of the state's "local interests".

More recently in *Davies Whse. Co.* v. *Bowles*, 321 U.S. 144 (1944), the court examined the vast scheme of state regulation of public warehouses in determining that such warehouses were public utilities within the meaning of the

Emergency Price Control Act and thus not subject to price control. The court said (pp. 148-9):

> "In *Munn* v. *Illinois*, 94 U.S. 113 (1877), this Court recognized that the business of public warehousing is 'affected with a public interest' and that its regulation by the state is appropriate and constitutionally permissible."

While the validity of state regulation was not in issue, the court necessarily recognized as a means of reaching its decision that a pattern of state warehouse regulation still exists in all its virility, even in the face of the United States Warehouse Act.

The movement for state regulation of warehouses has grown so that today such regulation is provided in 41 states, 30 of which regulate warehouse rates and charges.[5]

Public grain warehouses are the oldest form of state regulated public utility. Their regulation has become a traditional function of state government. If respondents' position were sustained, the regulatory systems of not only Illinois but of all of these 41 states would be seriously weakened, if not nullified and voided. Is it possible that Congress intended such a drastic result without having expressed such a purpose in conclusive terms?

B. Congressional intent to invalidate state legislation is never presumed. It must be clearly manifested.

An attack upon the validity of a state statute, whether on the ground of conflict with federal statutes, or with constitutional provisions, is of equal consequence to state sovereignty. In both instances, every presumption is indulged in favor of the validity of the state act. Unconstitutionality

[5] A tabulation of the states which provide for regulation of public warehouses is attached to this brief as Appendix B, pages 81-2.

will not be declared if a method of construction is available which would save the state act. So, too, the court will not strike down state authority on the ground of supersedure if it is possible to harmonize the state and federal systems.

In *Illinois Cent. R. R. Co.* v. *Pub. Utilities Comm. of Illinois*, 245 U.S. 493 (1918), the following consistently applied rule of construction was announced (p. 510):

> "In construing federal statutes enacted under the power conferred by the commerce clause of the Constitution the rule is that it should never be held that Congress intends to supersede or suspend the exercise of the reserved powers of a State, even where that may be done, unless, and except so far as, its purpose to do so is *clearly manifested.*"[6]

Similarly, in *Reid* v. *Colorado*, 187 U.S. 137 (1902), the court said (pp. 148, 153):

> "It should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police powers of the States, even when it may do so, unless its purpose to effect that result is clearly manifested. • • •
>
> "'The principle is universal that legislation, whether by Congress or by a State, must be taken to be valid, unless the contrary is made clearly to appear; • • •.'"

More recently, this court reiterated these fundamental principles in rejecting the claim of federal conflict with and invalidation of state authority, in *Railway Mail Association* v. *Corsi*, 326 U.S. 88, 97 (1945):

> "Congress must *clearly manifest* an intention to regulate for itself • • • before the police power of the state is powerless."

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[6] Italics in quotations throughout this brief have been supplied for emphasis.

In the instant case Congress has not provided for affirmative regulation of public warehouses. As we shall later point out, the United States Warehouse Act is a limited warehouse receipt statute. Nowhere in federal legislation is there a manifestation by Congress of an intent to invalidate affirmative state regulation of warehouses as public utilities. Instead, the act itself, as well as surrounding legislative history, firmly supports the conclusion that Congress intended to preserve state authority and authorized the federal agency to cooperate with the regulatory efforts of the states.

C. Principles of supersedure.

Sound public policy has dictated a refusal to strike down state authority when a claimed conflict with federal control is urged, unless a) there is a precise coincidence of state and federal control of a particular subject matter of regulation, or b) there is such actual and positive conflict and inconsistency in the two systems that state action cannot be reconciled with federal control.

This court, in recognition of the sovereign power of the states, discountenances inroads thereon by implication, and has refused to stifle state action unless what the state has required in the light of what Congress has ordered would truly entail contradictory duties and actual, not mere generalized or speculative conflicts.

These principles of construction have been repeatedly announced. As early as *Sinnot* v. *Davenport*, 22 How. (U.S.) 227, 243 (1859), the court said:

> "We agree, that in the application of this principle of supremacy of an act of Congress in a case where the State law is but the exercise of a reserved power, the repugnance or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together; * * * ."

More recently these same general principles were succinctly stated by Mr. Chief Justice Hughes in *Kelly v. Washington*, 302 U.S. 1 (1937). It was there claimed that a state law requiring the inspection of hulls and machinery of motor driven boats had been superseded by various federal enactments having to do with vessels plying federal waters. The boats concerned were federally registered or licensed, and were subject to numerous federal safety requirements. Federal acts also required the inspection of hulls and machinery of steam vessels and motor driven boats carrying passengers or freight. Because there was no specific federal provision for the inspection of hulls and machinery of motor driven boats not carrying passengers or freight, state authority in this precise field of control was sustained by a unanimous court. The question was stated as follows (p. 9):

> "The state court took the view that Congress had occupied the field and that no room was left for state action in relation to vessels plying on navigable waters within the control of the federal government. * * *
>
> "This argument, invoking a familiar principle, would be unnecessary and inapposite if there were a direct conflict with an express regulation of Congress acting within its province. The argument presupposes the absence of a conflict of that character."

The principles of supersedure were crystallized in the following words (pp. 9-10):

> "Under our constitutional system, there necessarily remains to the States, until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction although interstate commerce may be affected. * * * States are thus enabled to deal with local exigencies and to exert in the absence of conflict with federal legislation an essential protective power. And when Congress does exercise its paramount authority, it is obvious that Congress may deter-

> mine how far its regulation shall go. There is no constitutional rule which compels Congress to occupy the whole field. *Congress may circumscribe its regulation and occupy only a limited field. When it does so, state regulation outside that limited field and otherwise admissible is not forbidden or displaced. The principle is thoroughly established that the exercise by the State of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together.'*"

The court refused to nullify state authority and sovereignty in the absence of a showing of direct and positive repugnance or irreconcilable conflict between state and federal laws. This well established rule was not applied in the instant case by the court below. Reference to a few of the court's decisions which further illustrate the application of this rule seems warranted.

Savage v. *Jones*, 225 U. S. 501 (1912) held that a federal statute prohibiting misstatement of the contents of food products did not invalidate a state law requiring complete disclosure of such contents. The court said with respect to the federal act (p. 532):

> "But this does not cover the entire ground. It is one thing to make a false or misleading statement regarding the article or its ingredients, and it may be quite another to give no information as to what the ingredients are."

And further, with respect to the general principle, (on p. 533):

> "But the intent to supersede the exercise by the state of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other

words, such intent is not to be implied unless the act of Congress, fairly interpreted, is in *actual conflict* with the law of the state. This principle has had abundant illustration."

In *Townsend* v. *Yeomans*, 301 U. S. 441 (1937), it was claimed that the broad federal Tobacco Inspection Act superseded a Georgia statute fixing rates and charges of tobacco warehousemen. The federal act was replete with provisions controlling the inspection, marketing and handling of tobacco. The court rejected the argument that the state statute was nullified and held (p. 454):

> "*It is inconceivable that the Congress* in endeavoring to aid the tobacco growers in sorting or 'grading,' and thus to facilitate the marketing of their tobacco, *intended to deprive them of the protection they already had against extortionate charges of the warehousemen upon whom they depended in making their sales.* Instead of frustrating the operation of such state laws, the provisions of the Act expressly afforded and emphasized the opportunity for cooperation with the States in protecting the farmers' interests. In this view we find no ground for the contention that Congress has taken possession of the field of regulation to the exclusion of state laws which do not conflict with its own requirements.
>
> "The case calls for the application of the well-established principle that Congress may circumscribe its regulation and occupy a limited field, and that the intent to supersede the exercise by the State of its police power as to matters not covered by the federal legislation is not to be implied unless the latter fairly interpreted is in *actual conflict* with the state law."

The *Townsend* case is noteworthy, since the court found that Congress had not undertaken "to regulate the charges of the warehousemen" (p. 452), and as a consequence the state was free to fix warehousing charges. In the present case, Congress, in the United States Warehouse Act, has

not delegated authority to fix, determine or regulate warehousing charges.

It is also pertinent that in the *Townsend* case the court, in construing the federal law, found that Congress had "expressly afforded and emphasized the opportunity for cooperation with the States" as a legislative negation of any intent to abrogate state powers. The provision in the Federal Tobacco Inspection Act to which the court referred provides that the secretary "may cooperate" with the states. The United States Warehouse Act similarly provides that in the discretion of the secretary "he is authorized to cooperate with State officials charged with the enforcement of State laws relating to warehouses, * * * ". (Sec. 29)

Again in *Hill* v. *Florida*, 325 U. S. 538, 539 (1945) involving the validity of a Florida statute regulating labor unions, the court stated the governing standard of construction when supersedure is the issue by saying that the "only question" to be decided was whether the state act as applied was in "irreconcilable conflict" with the National Labor Relations Act. It is not sufficient that a speculative or argued conflict is shown. Before the court will nullify state authority, there must be a demonstration of conflict between state and federal control which is impossible to reconcile or harmonize. Supersedure will not follow because Congress has legislated in the general field, for if that were the rule, all local and state authority would be vulnerable to the claim of federal nullification by reason of the vast volume of federal legislation now on the books touching upon almost every phase of our social, community and economic life.

In addition to this salutory rule of construction, there is another principle which would preserve state regulation of warehouses. This court has repeatedly held that even

though Congress has delegated authority to a federal agency, in the absence of an exercise of that authority through an order which actually conflicts with an existing state directive, no supersedure will result. In other words, a mere potential conflict which may arise in the future will not invalidate state authority.

In *Terminal Railroad* v. *Brotherhood of Railroad Trainmen*, 318 U. S. 1, 4 (1943), the Illinois Commission had issued an order requiring the use of caboose cars on interstate trains in terminal areas. It was urged that the federal government had occupied the field and superseded the state requirement through the Boiler Inspection Act, Safety Appliance Act, Interstate Commerce Act, and the Federal Railway Labor Act. Under these comprehensive federal statutes the federal agency had very broad authority over the service and practices of railroads, and was empowered to issue orders dealing with the very subject matter involved. Nevertheless, the court held that the federal statutes themselves did not "lay down any requirement that cabooses shall or shall not be used on any of the runs in question. * * * at least in the absence of such action these acts do not themselves preclude the state order, * * *."

In *H. P. Welch Co.* v. *New Hampshire*, 306 U.S. 79 (1939), the court considered a state statute limiting the number of hours of continuous duty of drivers of certain types of motor carriers. It was urged that the state act was superseded by the provision of the Federal Motor Carrier Act empowering the Interstate Commerce Commission to "establish reasonable requirements with respect to * * * qualifications and maximum hours of service of employees * * *." The violation of the state statute had occurred at a time when the Federal Motor Carrier Act was in full force and effect, but before the Interstate Commerce Com-

mission had established any requirements in that specific field. In refusing to decree supersedure of the state statute under such circumstances, the court stated (p. 85):

> "* * * it cannot be inferred that Congress intended to supersede any state safety measure prior to the taking effect of a federal measure found suitable to put in its place. Its purpose to displace the local law must be definitely expressed. * * *
>
> "Plainly Congress by mere grant of power to the Interstate Commerce Commission did not intend to supersede state police regulations established for the protection of the public using state highways."

The Circuit Court of Appeals in this case has erroneously assumed that a mere possibility of future conflict, even though none presently exists, warrants the invalidation of the state regulatory system. The respondents have not disclosed a single instance where the Secretary of Agriculture, who administers the federal acts here involved, has performed any of the regulatory functions at issue. Indeed, federal statutes do not empower him to perform such functions.

D. The decision of the Circuit Court of Appeals.

The court below apparently did not heed or reasonably apply the established principles governing supersedure questions. It held:

> "In our view, all of the matters charged in the Rice complaint, on which the Commission has assumed jurisdiction and is asked to act, concern directly or indirectly the operation of federally licensed warehouses and the storage of grain therein for which receipts are issued. The allowance of such relief by the Commission on the charges thus made would conflict with the Warehouse Act or 'plainly and palpably infringes its policy.' The exercise of such authority by the Com-

mission would thwart the primary purpose which Congress sought to accomplish." (R. 122-3)

What, then, is the federal policy being palpably infringed, or the congressional purpose being thwarted, that would require such drastic results? Here we must resort to conjecture, for the court below does not define or discuss that policy except to say that since Congress has attached importance to warehouse receipts:

> "From their very nature it is reasonable to conclude that Congress intended that the federal government take over all authority necessary to preserve their legality, negotiability, safety and value. • • • Exclusive jurisdiction over the receipts having been conferred upon the Secretary, it seems unreasonable to conclude that he should be required to share with the state jurisdiction over the grain against which the receipts were issued and over the warehouses in which such grain was stored." (R. 117-8)

The Circuit Court of Appeals has not determined that Congress did "clearly manifest an intention to regulate for itself" or to supersede or suspend the reserved powers of the states. Instead, the court finds it "reasonable to conclude" that if an exclusive federal warehouse receipts act is passed, then, *ipso facto*, all state regulatory control over the institutions issuing receipts must necessarily be abrogated. According to this holding, federally licensed warehouses would be completely immune from all state or local regulation and control. In addition to being free of state public utility regulation, these public warehouses would also be free from state and local fire laws, zoning ordinances and blue sky laws.

The enactment of an exclusive federal warehouse receipts act of very limited scope does not thereby preclude all other forms of state regulation of warehouses. Congress has circumscribed its control and has remained silent with

respect to the affirmative regulation of rates, services, practices and finances of such warehouses, thereby permitting such state regulation which lies completely outside the limited field of federal control.

The court below did not determine that the state regulatory functions invoked have been expressly delegated to and were being exercised by the secretary. Instead, the court freely held that there was *implied* federal authority in the absence of express delegations. (R. 118, 122) Such action violates the fundamental doctrine that administrative powers are never presumed, but must be expressly delegated by legislation. Building upon this error, the court below invalidated specific and comprehensive state regulatory functions. No such violent annihilation of state action has ever been sanctioned.

The United States Warehouse Act, as we will later point out in detail, was intended to secure the integrity of warehouse receipts as an aid to the marketing of agricultural products. State regulation, far from infringing upon or thwarting this congressional policy and purpose, is in complete harmony therewith and supplementary thereto, serving to further orderly marketing. The secretary may prevent receipts from being issued without the proper grade and quantity of grain to support them, but the Illinois Commission protects receipt holders in an entirely different field—by securing storage at reasonable rates, under fair and non-discriminatory conditions, and by directing the institution of adequate service under sound financial conditions. These state regulatory functions do not even remotely infringe upon or thwart federal policy. As this court well said in *Townsend* v. *Yeomans*, 301 U. S. 441, 454 (1937):

> "It is inconceivable that the Congress in endeavoring to aid the tobacco growers in sorting or 'grading,'

and thus to facilitate the marketing of their tobacco, intended to deprive them of the protection they already had against extortionate charges of the warehousemen upon whom they depended in making their sales."

Congress has not occupied the field of state regulation here involved. *The secretary is without power or authority to grant any of the relief sought before the Illinois Commission.* The injunction is sought as a means of escaping all regulation. If the court should nullify state regulatory authority, it could not thereby create or transfer such regulatory power to the secretary. Federal warehousemen would be immune from those regulatory powers found in state law but not in the federal act. The position of the respondent warehousemen, apparently upheld by the court below, is that if federal authority exists as to *any* one aspect of warehouse control, then *all* aspects of state regulation are nullified. Counsel would have this court sanction inroads upon state rule by implication; annihilation of state sovereignty without a corresponding exercise of federal power and without a semblance of actual conflict or inconsistency; and abrogation of state utility regulation without providing a substitute. In short, the warehousemen seek destruction of the state system and the institution of a regulatory vacuum. Their fight is being made not because of a preference for federal over state control, but because of a warm desire to be entirely free from affirmative regulatory authority. The issuance of the injunction would have that consequence.

The principal case relied upon by the Circuit Court of Appeals is *Cloverleaf Butter Co.* v. *Patterson,* 315 U.S. 148 (1942) which was described as being the case "on its facts and questions decided most similar to the instant one . . ." (R. 112) The facts of the *Cloverleaf* case have no resemblance to the instant case. The question there raised was the validity of state inspection and seizure of pack-

ing stock butter which went into the manufacture of processed butter. Federal authority existed to regulate the production of processed butter, and the conditions under which it was made, to inspect the finished product and to seize it if it were found to be deleterious to health. As the court pointed out, the "entire process of manufacture is subject to federal supervision" (p. 154) and the state control "conflicts with the purpose or provisions of the federal legislation * * *." (p. 167) Hence there was a precise coincidence of federal regulatory controls and the attempted state function. As the court stated (p. 169):

> "To uphold the power of the State of Alabama to condemn the material in the factory while it was under federal observation and while federal enforcement deemed it wholesome would not only hamper the administration of the federal act but would be inconsistent with its requirements. * * * Since there was federal regulation of the materials and composition of the manufactured article, there could not be similar state regulation of *the same subject.*"

The court did not say that the federal agency had "implied" authority to regulate such butter. It held that "confiscation by the state of material in production nullified federal discretion over ingredients." (p. 168) The court indicated that federal statutes must be strictly construed when the question is one of supersedure, saying (p. 156):

> "When the prohibition of state action is not specific but inferable from the scope and purpose of the federal legislation, it must be clear that the federal provisions are inconsistent with those of the state to justify the thwarting of state regulation."

In any event, the *Cloverleaf* case turned on a five to four decision, and shortly thereafter, the views expressed and some of the exact language used by Mr. Chief Justice

Stone in the dissenting opinion (315 U.S., at 170) became the majority opinion in *Penn Dairies* v. *Milk Control Commission*, 318 U.S. 261, 275 (1943).

Another case cited by the lower court was *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941). In that case the court held that the Pennsylvania Alien Registration Law was superseded because it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress". The court, however, was careful to emphasize that the legislation involved was in a field:

> "* * * which affects international relations, the one aspect of our government that from the first has been most generally conceded imperatively to demand broad national authority. Any concurrent state power that may exist is restricted to the narrowest of limits; * * *." (p. 68)

In the later case of *Allen-Bradley Loc.* v. *Wisc. Emp. Rel. Bd.*, 315 U.S. 740 (1942), the court took occasion to limit the effect of the *Hines* case in the following language (p. 749):

> "* * * we were more ready to conclude that a Federal Act in a field that touched international relations superseded state regulation than we were in those cases where a State was exercising its historic powers over such traditionally local matters as public safety and order and the use of streets and highways."

We submit that on the basis of the established standards and principles announced by this court, no ground for striking down state acts providing the type of regulation here involved has been revealed.

We turn now to an analysis of the federal and state statutes.

II

UNITED STATES WAREHOUSE ACT

A. The federal act is limited and circumscribed in its provisions, scope and purpose.

Congress enacted the United States Warehouse Act for the purpose of establishing a warehouse receipt that would be more readily accepted as collateral on loans. Its aim was to avoid certain gross dishonesties that had been practiced by warehousemen, such as issuing receipts for products not in store, failing to cancel receipts after delivery, or returning an inferior grade and a smaller quantity of the stored commodity because of inadequate inspection and weighing practices.[7]

The act in nature, form and intent is essentially a warehouse receipt act. It does not in any respect provide for affirmative regulation. It certainly does not resemble a utility regulatory system. It provides for negative control through the revocation of a permissive license, and delegates a minimum amount of authority to the secretary.

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[7]Legislative history of the statute bears out the very limited purpose to be served. In 1916 when the act was passed, the House Report stated:

> "A study of the provisions of the bill will show that great care has been taken for the protection of the integrity of the receipt issued from the warehouses proposed to be licensed, • • • "

When the act was amended in 1931, Congress again gave recognition and emphasis to the statute's objective to protect the farmers from dishonest warehousemen and "enhance the value of receipts for collateral purposes". H. Rept. 60, 64th Cong., 1st Sess., January 21, 1916; S. Rept. 1775 to 71st Cong., 3rd Sess., February 17, 1931; Misc. Circ. No. 51, pp. 1-2, issued by the U.S. Dept. of Agric. January, 1926, reprinted 1932; See discussion of legislative history in amicus curiae brief of National Association of Railroad and Utilities Commissioners, pp. 53-64.

A summary of the entire act significantly reveals its very limited nature. Under the act the secretary is authorized to:

(a) License warehouses "suitable for the proper storage of the particular agricultural product" upon application to him. (Sec. 4)

(b) Investigate and inspect warehouses and examine their books. (Sec. 3, 27)

(c) Prescribe duties of licensed warehouses with respect to the care of and responsibility for stored products "within the limitations" of the act. (Sec. 3)

(d) Prescribe form and terms of bond. (Sec. 6)

(e) License persons to act as inspectors, samplers and classifiers of agricultural products. (Sec. 11)

(f) Suspend or revoke licenses of inspectors, samplers and classifiers, after opportunity for hearing, for violation of the act or for improper conduct. (Sec. 12)

(g) Charge fees for the inspection of warehouses and the issuance of licenses to warehousemen or inspectors. (Sec. 10)

(h) Establish standards for agricultural products. (Sec. 19)

(i) Examine products stored and publish findings if warehouseman is not performing his duties under the act. (Sec. 24)

(j) Suspend and revoke warehouse licenses after opportunity for hearing for violation of the act or rules, or upon the ground that "unreasonable or exorbitant charges have been made for services rendered". (Sec. 25)

(k) Make rules and regulations deemed necessary for the efficient execution of provisions of the act. (Sec. 28)

(l) In his discretion, "to cooperate with State officials charged with enforcement of State laws relating to warehouses, warehousemen, * * * but power, jurisdiction and authority conferred upon the Secretary * * * under this Act shall be exclusive" with respect to federal licensees. (Sec. 29)

Licensed warehousemen are obligated to:

(a) Agree as a condition to issuance of license to comply with terms of the act and rules thereunder. (Sec. 4)

(b) Execute a bond to secure faithful performance of obligations under the act. (Sec. 6)

(c) Receive for storage so far as his capacity permits agricultural products tendered "without making any discrimination between persons desiring to avail themselves of warehouse facilities." (Sec. 13)

(d) Keep fungible agricultural products of different grades separate. (Sec. 16)

(e) Issue warehouse receipts only for agricultural products actually stored, which receipts are to embody certain specified information. (Sec. 17, 18)

(f) Not issue further receipts for same products while original receipt is outstanding, unless lost or destroyed, in which case a new receipt may be issued in compliance with the "laws of any State applicable thereto" in any place other than federal territory. (Sec. 20)

(g) Deliver products without unnecessary delay when demanded by receipt holder. (Sec. 21)

(h) Cancel receipts upon delivery of stored products. (Sec. 22)

(i) Keep records of products stored and withdrawn, receipts issued and cancelled. (Sec. 23)

Penalties are provided for falsely representing oneself as a federally licensed or bonded warehouse, issuing a fraudulent receipt, fraudulently classifying or weighing

products stored, or converting such products to one's own use.

That is the sum total of the United States Warehouse Act. The complete impoverishment of the secretary's affirmative authority under the act is revealed by Section 24. There the secretary is authorized to examine licensed warehousemen and when he determines that they are not performing their duties fully under the act or rules, he "may publish his findings". He cannot order a change in operations or practice. He cannot take any affirmative step to correct these determined violations. But he is permitted to make the violations publicly known.

All aspects of the United States Warehouse Act as indicated by the summary above, relate to the sole purpose and objective of Congress: the creation of a more dependable warehouse receipt.

B. The acquisition of a license under the federal act is wholly permissive and voluntary.

The method employed by Congress to carry out its objective furnishes a key to the highly circumscribed character of the federal authority involved. Control is acquired through the *voluntary or permissive* acquisition of a license. No warehouseman, even though engaged exclusively in storing agricultural products for interstate commerce,[8] is required or compelled to secure a license to conduct his operations.[8] But *if he so desires,* a warehouseman may apply

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[8]The permissive character of the statute has been regularly referred to by Congress and in bulletins of the department. Misc. Circ. No. 51, p. 2:

> "The law does not require every warehouseman to be licensed. This is an important feature. If all warehousemen had to operate under the law, that would mean that the good and the bad, the honest and the dishonest alike would be licensed."

S. Rept. No. 1775, 71st Cong., 3rd Sess., p. 2: The 1931 amendment "does not change the permissive feature of the Federal act. No warehouseman is obliged to operate under the Federal act."

for and obtain a federal license. The federal control, limited and circumscribed as it is, rests upon the option of the warehouseman. The only sanctions applied against licensed warehousemen by the act (aside from criminal penalties for fraudulent issue of warehouse receipts or unlawful removal of products stored) are publication of the results of the secretary's investigation, or suspension or revocation of a license. In the latter event, the warehouseman is *entirely free* to conduct his business (even under the very terms which led to the revocation) *without* a federal license. Nowhere in the statute is the secretary granted powers necessary to adequate public utility regulation: Authority to issue orders or directives or to make decisions on any of the multitudinous problems which constantly arise in this field.

The sketchy nature of this system of "regulation" is explainable by a reluctance of Congress to enter a traditionally local field of regulation, and a decided uncertainty over the constitutionality of mandatory and comprehensive federal regulation of warehousing activities.[9]

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[9]Constitutionality of the U. S. Warehouse Act was discussed in Congressional debate in the House, Vol. 53, Cong. Rec. Pt. 7, pp. 7068-7085, April 29, 1916. The following remark was made on page 7070:

> "The proponents of the bill, however, claim that the regulatory provisions are valid because they are permissive only, that is, they apply only to such persons as apply for licenses and agree to be bound by them."

At another point in the Congressional debate, Mr. Lever, sponsor of the bill said (Vol. 53, Cong. Rec. Pt. 6, pp. 5925-6, April 11, 1916):

> "I wish to emphasize that the provisions of this bill are permissive and in no sense compulsory. No warehouse is forced to come into the system. That is left entirely to the individual wishes of each warehouseman. He will determine the advantages and disadvantages of the situation. We have deliberately made the bill permissive rather than compulsory.
>
> "I wish also to point out very distinctly that the system proposed here cannot interfere with any system organized under

On the basis of the ruling of the lower court, a warehouseman, by voluntarily securing a permissive federal license, would completely immunize himself from all state regulation. Not only would the licensed warehouseman be free of state controls over the issuance of warehouse receipts, or the other limited subjects of control specifically delegated to the secretary, but in addition he would be free from the state's affirmative authority to prescribe reasonable rates, adequate services, non-discriminatory practices, and sound financing—functions which the secretary is powerless to perform under the federal act. The warehousemen would be able to avoid and flaunt affirmative utility regulation completely by securing a federal license. State sovereignty would then be nullified not by Congress, but by the whim of quasi-public institutions that should be regulated. Certainly, Congress could not have intended such a result.

C. The secretary does not possess any affirmative regulatory powers.

The United States Warehouse Act was not intended to and does not constitute a utility regulatory statute. There is a complete absence of provisions for mandatory or directory establishment of reasonable rates and practices, adequate service, or sound security and financial relationships.

The federal act fails to deal with the following subjects which are of fundamental importance to any regulatory system and which are traditionally delegated by legislation

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state or local authority. I recognize the value of state and local systems of warehousing farm products, and I would not in the least hamper them. I believe emphatically that there is ample work for both systems to do, and that the two will quickly harmonize their efforts and aims."

See also *U. S.* v. *Hastings*, 296 U. S. 188, 198 (1935) where the federal government urged that the permissive character of the statute had great weight in determining whether Congress had encroached upon the powers of the states.

to administrative agencies if affirmative regulation and control is the aim:

a) No authority is granted the secretary to order or direct a licensed warehouse to take any affirmative action. Indeed, the secretary is without power to issue any regulatory order.

b) No requirement is made for the preparation of findings of fact and conclusions of law.

c) The act fails to set forth legislative standards governing administrative policy upon those regulatory matters involved before the Illinois Commission.

d) No power is delegated to the secretary to conduct hearings generally. True, the statute requires that before a license may be suspended or revoked, the licensee shall have an opportunity for a hearing. (Sec. 25) Nothing further is said in the statute with respect to such hearings. There is no grant of authority to administer oaths, to take depositions, issue subpoenas, conduct the hearings publicly or privately, maintain a record of such hearings, or such other matters as are customarily contained in legislation which both empower the conduct of administrative hearings and at the same time surround them with the safeguards of fair play and due process. The secretary has supplemented that statutory provision in Regulation 10, Section 4. Even a casual reading of that regulation emphasizes the total lack of the fundamental prerequisites of a hearing between contending parties.

e) No provision is made for rehearings or for judicial review. This latter omission speaks eloquently of the lack of adjudicatory and mandatory powers in the secretary.

f) Collateral regulatory authority is completely lacking. So, for example, when rates are involved there should be provisions for reparation awards, for authority to make valuations of property, determi-

nations of proper depreciation charges, the maintenance and reporting of comprehensive financial data and operating results. No such authority is possessed by the secretary.

The federal act in its present form could not be constitutionally sustained as a proper legislative delegation of administrative authority if construed to regulate rates, discriminatory practices, the adequacy of service or security issues and financial transactions. The statute is devoid of those required constitutional safeguards of procedural due process, in that appropriate legislative standards are lacking, no requirements are made for specific findings of fact, and no provision is made for judicial review: *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 415, 432 (1935); *N.L.R.B.* v. *Jones and Laughlin*, 301 U. S. 1, 47 (1937); *Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337, 345-6 (1937); *Myers* v. *Bethlehem Corp.*, 303 U. S. 41, 49 (1938).

The United States Warehouse Act completely lacks the normal and customary provisions found in any system of affirmative utility regulation. This lack of requisite regulatory provisions again graphically demonstrates that the act is only a limited warehouse receipt act. It was intended as a supplement to and not the executioner of existing state authority.

The Circuit Court of Appeals erroneously speaks of the federal act as granting "regulatory power", "affirmative authority" (R. 121), and "express authority" over rates and discrimination. (R. 122) The secretary was not delegated any affirmative or regulatory authority. He is completely without power to grant any of the relief prayed before the Illinois Commission, or to order any licensed warehouse to change its rates or practices.

D. Congress has provided only a "measure of control" by the United States Warehouse Act and has expressly sanctioned co-existing state authority.

In those instances where the United States Warehouse Act has been discussed or referred to by this court, it has been recognized as a limited and circumscribed statute which afforded only a "measure of control". In *Federal Compress & Whse. Co.* v. *McLean,* 291 U. S. 17 (1934), the court said, in sustaining a state tax upon a federally licensed warehouse (pp. 22-3):

> "The Warehousing Act confers upon licensees certain privileges and secures to the national government, by means of the licensing provisions, a measure of control over those engaged in the business of storing agricultural products who find it advantageous to apply for the license. The government exercises that control in the furtherance of a governmental purpose to secure fair and uniform business practices."

More recently, in *Union Brokerage Co.* v. *Jensen,* 322 U. S. 202 (1944), the same characterization of the Warehouse Act was expressed. In that case Union, a custom house broker, was licensed by the Treasury Department. Minnesota required foreign corporations doing business in the state to secure a certificate and pay a fee as a prerequisite to maintaining an action in the state court. The state law was attacked on the ground of repugnance to the federal licensing statute. The court sustained the state authority on the ground that federal control was limited and did not conflict with the interests sought to be protected by the state. The court said in this regard (pp. 207-8):

> "In a situation like the present, where an enterprise touches different and not common interests between Nation and State, our task is that of harmonizing these interests without sacrificing either. The proper attitude

> of mind for making such an accommodation is illustrated by *Federal Compress Co.* v. *McLean*, 291 U. S. 17. *The Tariff Act of 1930 in this case, as the Warehousing Act in that case*, confers upon licensees certain privileges, and secures to the Federal Government by means of these licensing provisions a *measure of control* over those engaged in the customhouse brokerage business. But such *circumscribed control* by the Federal Government does not imply immunity from control by the State within the sphere of its special interests."

The limited and "circumscribed control" found in the Tariff Act of 1930 was considered similar to the United States Warehouse Act, which secured only a measure of control over licensed warehouses. In the *Jensen* case the license issued under the limited and circumscribed Federal Tariff Act did not exclude state control of the licensed custom house broker. Similarly the limited United States Warehouse Act should not preclude state utility regulation of licensed warehousemen.

Finally, in *Townsend* v. *Yeomans*, 301 U. S. 441, 457 (1937), the court again reiterated its characterization of the United States Warehouse Act as providing only limited control.

Congress itself expressly acknowledged that the act had narrow limits when in Section 3 it authorized the secretary

> "* * * to prescribe, *within the limitations of this Act*, the duties of the warehousemen * * * with respect to their care of and responsibility for agricultural products stored therein."

Congress also recognized and expressly sanctioned the co-existence of state laws operating upon licensed warehousemen. The continued administration of state warehouse regulations was intended and anticipated.

Section 18 of the federal act provides that "unless otherwise required by the law of the state", a warehouse receipt

issued for other than fungible products, may omit compliance with sub-paragraph (g) of that section. Then, again in Section 20, relating to the issuance of substitute warehouse receipts when the original is destroyed, it calls for "compliance with the laws of any state applicable thereto".

Finally, in Section 29 it is expressly provided that the secretary in his discretion

> "* * * is authorized to cooperate with State officials charged with the enforcement of State laws relating to warehouses, warehousemen, * * *."

By this provision, recognition is given to the continued existence of state laws which would operate upon federally licensed warehousemen—and thus would provide an opportunity for the secretary's cooperation in a coordinated and more complete form of regulatory control. If supersedure occurs there is no state law left in effect relating to the warehouses under the secretary's jurisdiction. Certainly the plain language of the statute authorizing cooperation negatives the argued congressional intention to preempt the field and exclude the states. As the court said in the *Jensen* case (p. 209):

> "Where the Government has provided for collaboration the courts should not find conflict."

Congress must have had knowledge of the extensive state regulation of warehouses which now exists in forty-one states. (Appendix B) Were respondents' position sustained, these state regulatory systems would be nullified and voided. It is inconceivable that Congress would intend to invalidate existing extensive state regulation, in a local field normally reserved for the states, by the enactment of a circumscribed federal statute whose limited control is provided solely by a permissive, voluntary license. As the court said in *Townsend* v. *Yeomans*, 301 U. S. 441, 457 (1937):

> "Instead of frustrating the operation of such state laws, the provisions of the Act expressly afforded and emphasized the opportunity for cooperation with the States * * *."

The provision for cooperation in the Federal Tobacco Inspection Act which was construed by the *Townsend* case is similar to the provision in the United States Warehouse Act.

E. Effect of the 1931 Amendment.

Respondents and the Circuit Court of Appeals place principal reliance for supersedure upon a 1931 amendment to Section 29 of the United States Warehouse Act. That section as originally enacted provided in part:

> "* * * nothing in this Act shall be construed to conflict with, or to authorize any conflict with, or in any way to impair or limit the effect or operation of the laws of any State relating to warehouses, warehousemen, * * *."

This provision was unusual in federal legislation and made the federal authority entirely subservient to state warehouse regulation of any type, even in cases of conflict. Under that system, minimum federal requirements to insure dependable warehouse receipts were destroyed by state laws permitting loose practices in the issuance of receipts.[10]

Congress amended Section 29 to establish the federal act as supreme, but only with respect to those specific

[10]In Misc. Circ. No. 51, issued by the U. S. Dept. of Agric. in 1926, the federal administrator on pages 7-8 described an instance where state laws permitted warehousemen to ship a product from one warehouse to another if the first was filled. Grain, for example, would be presented, a receipt issued, but the grain stored elsewhere not under the warehouseman's control; and it would frequently happen that when the farmer presented his receipt and demanded delivery, the grain was not available.

phases of control delegated to the secretary. The sole purpose of the amendment was to strengthen the value of warehouse receipts by eliminating conflicting state provisions.

The House Committee report (H. Rept. No. 4, 71st Cong., 1st Sess., p. 4), states:

> "Under Section 29 * * * of the law as at present, if the Federal Act *in any way conflicts with the State law, the Federal law becomes subservient* to the State law in so far as there is a conflict. The result is that the Federal law can be negatived by State legislation. *This condition has worked against Federal warehouse receipts attaining that degree of usefulness for collateral purposes in the financing of agricultural products which Congress had intended they should attain.* Bankers generally have recognized the worthy purposes of the warehouse act, but when they are approached to loan large amounts they view section 29 of the present law with considerable misgiving. To make the law accomplish the real purpose of Congress, it should be independent of any State legislation on the subject. The amendments proposed to section 29 of this bill aim to make the Federal warehouse act stand on its own bottom."

The Senate Committee report (S. Rept. No. 1775, 71st Cong., 3rd Sess., p. 2), is similar:

> "The effect of this wording [in Section 29 before its amendment] is to make the Federal act subservient to State acts wherever there is a conflict. *As might be expected there are conflicts between State laws and the Federal act. Since the law specifically makes the Federal act subservient to State laws in case of conflict, this feature militates against the full value of Federal warehouse receipts for collateral purposes.* The amendment proposed to this section would make the Federal act independent of State laws. In other words, it would place the Federal act on its own bot-

tom. * * * This amendment will clarify and remove many uncertainties from the credit man's viewpoint. As the law now reads, for fear the Federal act may be negatived by State legislation or regulation, a banker is obliged to follow closely the laws of the 48 different States, the regulations thereunder, and the administrative rulings thereunder. This is an impossible task."

This limited purpose of the 1931 amendment is clearly borne out by Congressman Clark of New York, who sponsored the bill in the House and stated:

"The only section of that bill that should raise any question at all in any member's mind is the Sec. 29 amendment. Under the present law, if the Federal act in any way conflicts with State laws, the Federal act becomes subservient to the State law in so far as there is *conflict*. The result is that the Federal law can be negatived by State legislation. This condition has put a severe limitation at times on Federal warehouse receipts attaining that degree of usefulness that they should have and that the Congress intended that they should have for collateral purposes. In fact, *this very limitation can defeat the very intent of Congress and render worthless as collateral the receipts issued under the law.* Any clause or phrase in the law which raises a doubt in the banker's mind about the receipts cast a cloud on their collateral value. *As the one big purpose of the Warehouse Act was and is to convert the farm products into collateral value,* and as this act during the past ten years has proved its value to the farmer and his cooperative associations, we should not hesitate to perfect it and make the warehouse receipts issued thereunder above suspicion." (Vol. 72, Cong. Rec. Pt. 8, p. 8530, H.R. 7.)

It should be noted that in the committee reports and in the debates, the reference is to "conflicts" with state laws, and no mention is made of the areas of state regulation

that are not included in the federal act. The co-existence of state authority outside the limited field covered by the federal warehouse receipt control is tacitly recognized.

Significantly the legislative history surrounding the 1931 amendment contains no discussion of the desire, intent or purpose of the legislators to nullify *all* state regulation over federally licensed warehouses. The only purpose sought was the reorientation of state versus federal dominancy upon specific matters of control where conflict had existed. Actually the 1931 amendment was passed by both houses without debate, and was recommended by both committees unanimously.[11] The court will recognize as highly improbable the enactment of federal legislation which nullifies extensive state authority in the very serious and complete manner claimed, without discussion, controversy or opposition, especially since the act as originally passed received congressional support largely because of repeated assurances that state regulation was being preserved. (See *supra* p. 31-2)

Section 29 as amended now reads:

> "That in the discretion of the Secretary of Agriculture he is authorized to cooperate with State officials charged with the enforcement of State laws relating to warehouses, warehousemen, weighers, graders, inspectors, samplers, or classifiers; but the power, jurisdiction, and authority conferred upon the Secretary of Agriculture under this Act shall be exclusive with respect to all persons securing a license hereunder so long as said license remains in effect. * * *"

This section cannot be distorted to nullify all state regulation over federally licensed warehousemen.

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[11] 72 Cong. Rec. Pt. 8 p. 8530; 72 Cong. Rec. Pt. 8 p. 8529; 74 Cong. Rec. Pt. 6 p. 6138; S. Rept. No. 1775 to 71 Cong. 3rd Sess.; H. Rept. 4 to 71st Cong. 1st Sess.

First, the opening phrase of the section expressly provides that the secretary may cooperate with state officials charged with the enforcement of state warehouse laws. By this provision recognition is given to the continued existence of state laws which would operate upon federally licensed warehousemen, and thus provide an opportunity for cooperation. This plain language negatives any alleged congressional intent to preempt the entire field and exclude the states. A similar preservation of state authority is made in Sections 18 and 20 of the act.

Second, the reference to the exclusive power and authority of the secretary is limited to the authority "conferred * * * under this Act". In other words, specific matters of control which have been delegated to the secretary are dominant in case of conflict with state authority. But this language cannot be expanded to grant the secretary exclusive regulatory power over all phases of warehousing operations and all manner of regulatory problems, even though the power was not delegated to the secretary and is beyond the authority which he can exercise. This clause was given its limited and obvious meaning in *U. S.* v. *Hastings*, 296 U. S. 188, 199 (1935). The question involved was the sufficiency of an indictment under Section 30, charging the theft of cotton from a federally licensed warehouse for which a receipt had been issued. The indictment failed to allege that the cotton was being stored "for interstate commerce," and upon demurrer the court held the act inapplicable and said with respect to amended Section 29:

> "While the amendment asserts the exclusive authority of the Secretary of Agriculture, it has relation to the authority conferred by the Act, * * *."

According to the *Hastings* decision, the secretary's exclusive jurisdiction occurs only with respect to expressly dele-

gated powers and authority, but as to matters concerning which the secretary has no authority, the state's functions are left unaffected.

The Circuit Court of Appeals concluded that the *Hastings* case was not applicable since it dealt only with the absence of the secretary's authority with respect to intrastate commerce.[12] But the court's reasoning is equally applicable to the disputed areas of regulation here involved, over which the secretary likewise lacks authority.[13]

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[12]Under the *Hastings* case the United States Warehouse Act has no application to grain stored for intrastate commerce. The warehousemen by affidavit admit that a substantial portion of the grain they handle both originates at and is destined to points in Illinois. For example:

> Continental Grain—88% of all corn handled originated in Illinois and 21% shipped to Illinois points (R. 69).
>
> Stratton Grain—17.7% of all grain handled was wholly intrastate (R. 65).
>
> Norris Grain originated 38% of its stored grain in Illinois and shipped 15% to Illinois points (R. 67).
>
> Cargill—15% of all grain handled was intrastate (R. 74).

Hence as to this intrastate storage the federal act can have no application even in a limited manner. With respect to intrastate storage state regulation must be evident. Yet, the court below rejected even this undeniable basis for continued state control.

[13]Of interest is the reference by the Circuit Court of Appeals (and the respondents) to the case of *Independent Gin & Whse. Co.* v. *Dunwoody*, 40 F. (2d) 1 (C.C.A. 5th 1930) and the significance attached to the alleged timing of the 1931 amendment as being "shortly thereafter". (R. 113) The *Dunwoody* case sustained a state license fee upon an already licensed federal warehouse. The decision was rendered April 21, 1930, but the amendment to Section 29 had been proposed in Congress years prior and had actually passed the House in 1929. The House Committee report (H. Rept. No. 4, 71st Cong., 1st Sess., p. 5) states:

> "The present legislation * * * was introduced in the seventieth session of Congress at the request of the Department of Agriculture, favorably reported by the committee, and passed by the House on February 25, 1929."

Third, the 1931 amendment did not confer any additional jurisdiction and authority upon the secretary. The general provisions of the act remained as they had been since 1916. The secretary's jurisdiction was not broadened one whit. The act was still a warehouse receipt act, and the power and authority that was made "exclusive" was the limited and circumscribed power that had previously existed and been exercised. If Congress had intended to invalidate *all* state warehousing regulations in 41 states, it would certainly have said so manifestly and expressly, and would have broadened federal regulation to continue existing protective features of the state systems.

The court below referred to the 1931 amendment of Section 6 of the United States Warehouse Act as demonstrating an intent to relieve federally licensed warehouses from state laws. That section dealt with the bonding requirement and the amendment eliminated the provision causing bonds to secure the faithful performance of obligations under state as well as federal laws. But, as revealed in the Senate Committee report, this action was taken in contemplation of the fact that state laws, to which these licensed warehouses would be subject, would continue in effect and might exhaust the bond to take care of claims under state law. The Senate Committee said:[14]

> "The next amendment eliminates from section 6 of the present act the clause which provides that the bond shall secure the faithful performance of the warehouseman's obligations as defined by State laws. *Since the act does not give the department jurisdiction to enforce State laws, it is obviously unfair that a bond should be exacted of a warehouseman to satisfy State laws.* Such a requirement subjects the bond to greater exposure of liability and naturally such increased exposure is reflected in the rates charged for bond premiums. More-

[14] S. Rept. No. 1775, 71st Cong., 3rd Sess., p. 2.

over, if the bond is available under State acts this may result in taking away from Federal receipts some of the very best security that the Federal act contemplates shall be available for their protection. Again this amendment to section 6 naturally follows the amendment suggested to section 29."

Congress could have exempted federally licensed warehouses from all state laws. Instead, it chose to recognize the continued application of state laws upon such warehouses, but for the reasons stated limited the liability under the federal bond.

Three other matters referred to by the Circuit Court of Appeals as being of some significance in determining the supersedure issue require our attention:

In connection with the 1931 amendment to the United States Warehouse Act, the court below attaches significance to the footnote references to the federal act contained in *Cloverleaf Butter* v. *Patterson*, 315 U.S. 148 (1942). The court below said (R. 115-6):

> "In this connection it is pertinent and of some importance to note that in *Cloverleaf Butter Co.* v. *Patterson, supra,* the court (page 155), cites in footnote 5 *Merchants Exchange* v. *Missouri,* 248 U.S. 365, 368, as one of the cases holding that the state was free to legislate upon matters left unregulated by the nation. True, the court in the *Merchants* case referred to § 29 of the Warehouse Act as manifesting the purpose of Congress not to supersede state laws. This reference, however, was made prior to the time § 29 was amended in 1931. More significant is that the court in the *Cloverleaf* case in footnote 6 (page 156) cites § 29 as an instance where Congress had specifically exercised its power of legislation so as to conflict with the regulation of the state, and that the federal legislation became exclusive in its application. The footnote reference was to § 29 as amended in

> 1931. Thus we have the court in the same opinion treating § 29 before it was amended as an illustration of dual authority and § 29 after it was amended as providing for sole authority in the federal government."

But this court said the following in the *Cloverleaf* decision (pp. 155-6):

> "It has long been recognized that in those fields of commerce where national uniformity is not essential, either the state or federal government may act. * * * Where this power to legislate exists, it often happens that there is only a partial exercise of that power by the federal government. In such cases the state may legislate freely upon those phases of the commerce which are left unregulated by the nation.[5] But where the United States exercises its power of legislation so as to conflict with a regulation of the state, either specifically[6] or by implication,[7] the state legislation becomes inoperative and the federal legislation exclusive in its application."

Clearly the court, in footnote 6, referred to the amended United States Warehouse Act as providing specifically for federal authority to the exclusion of similar state action *but only in the field specifically covered and when "conflict" exists*. This follows from the amendment of the federal act providing that federal "power, jurisdiction and authority conferred * * * under this Act shall be exclusive." The superseding effect of the federal act is restricted to its own narrow limits as we have demonstrated above.

Secondly, the court below erroneously stated that the South Dakota court in *In re Farmers Cooperative Ass'n.*, 8 N.W. (2d) 557 (1943) "considered the precise issue presented here", and presumably decided in favor of complete state supersedure. In that case the state required a federal licensee to secure a state license, as a condition to continu-

ing in business. The only issue presented was the necessity of *two licenses.* Whether the United States Warehouse Act precludes the state from regulating rates, services, practices and financing was not discussed or involved.

In the South Dakota case it was held that the state versus federal licensing requirements involved a head-on collision, and, therefore, "federal control displaces state control". But this assumed that there was federal control of the precise subject matter of the regulation at issue—in that instance, licensing. Furthermore, the statute involved was the South Dakota equivalent of the Illinois Grain Warehouse Act. It was in no respects a comprehensive public utility regulatory system, such as is provided in the Illinois Public Utilities Act. We believe the South Dakota decision is not sound, even with respect to the narrow ground upon which it is based, since the federal license is not required, but is merely permissive or voluntary, while the state actually requires a license before local warehousing services may be conducted. In any event, if the decision were expanded to support complete supersedure of all state control over federally licensed warehouses, it would conflict with this court's holding in the *Hastings* case, and do violence to the plain language of the United States Warehouse Act.

Finally, the Circuit Court of Appeals referred to Section 5(a)(7) of the Commodity Exchange Act as of "some significance". (That section is set forth in Appendix A page 80.) That federal statute deals with futures trading and with contract markets where such trading is permitted, and not with warehouse regulation. Section 5(a)(7) compels contract markets to require that federal receipts shall be accepted in satisfaction of futures contracts "without discrimination" and despite the fact that the issuing warehouseman is not also licensed under state laws. The pur-

pose of the section was to eliminate discriminations against federally licensed warehouses. The Senate floor manager of the bill, in proposing Section 5(a)(7), stated:

> "The sole purpose of the proposed amendment is to eliminate arbitrary and unfair discrimination against warehousemen licensed under the Federal Warehouse Act who desire their receipts to be made tenderable on future contracts and to give the advantages of additional warehouse facilities to traders in the market." (80 Cong. Rec. 6834, 74th Cong., 2nd Sess., April 4, 1936)

This section deals with a special problem existing on futures markets. It does not supersede even state license requirements, but merely requires a contract market to recognize as tenderable on futures contracts a receipt issued by a federal licensee. The section does not bear upon or affect state regulation over rates, service, practices and financing. Both federal and state houses continue to be subject to all rules of the contract markets and to all applicable state laws, so long as such rules and laws are applied "without discrimination".

F. Federal Trade Commission 1937 report and recommendations to Congress.

In 1935, some years after the 1931 amendments to the United States Warehouse Act, the Federal Trade Commission, pursuant to Public Resolution No. 61 of the Seventy-fourth Congress, investigated the gr in trade and submitted a comprehensive three-volume report to Congress entitled "Agricultural Income Inquiry" (1937). This report, in part, contained the following recommendations with respect to public grain warehousing (pp. 40-1):

> "• • • Commission is of the opinion that Federal legislation should be adopted providing for the following things:

"1. That all deliveries of grain on futures contracts shall be made from public warehouses:

"(a) Licensed by Federal authority.

"(b) Subject to Federal regulation.

"(c) Not owned, operated, or controlled, directly or indirectly, by any person, firm, or any other organization directly or indirectly dealing in grain. * * *

"3. That the storage charges for grain in public warehouses from which grain is deliverable on futures contracts as aforesaid shall be regulated by the Federal authority."

The Federal Trade Commission was thus of the opinion that the permissive warehouse license for warehouses used for delivery on futures markets should be made mandatory; that real regulation rather than the existing limited negative control should be provided; and that storage charges should be regulated and determined on the federal level. These recommendations constitute a considered opinion by an important federal agency that federal regulation does not exist, despite the 1931 amendments to the United States Warehouse Act. Congress was requested to legislate federal regulation, but has thus far refused to act.

G. Conclusions on the United States Warehouse Act.

Numerous factors or circumstances exist in the instant case which militate against the existence of a congressional intent to preempt the field of regulation of federal warehouses and exclude the states. These factors must lead the court to reject the warehousemen's attempt to nullify and annihilate state authority.

1. The United States Warehouse Act by its terms and provisions provides only limited and circumscribed control. It has been characterized as providing only a "measure of control".

2. The federal act emphasizes its limited objectives by making the acquisition of a license permissive or voluntary. No license is *required* even of a wholly interstate house.

3. The federal act does not delegate affirmative regulatory powers and is devoid of the normal and fundamental authorities contained in a regulatory statute. No mandatory orders and directives redressing abuses can be issued by the secretary.

4. Cooperation and collaboration with state agencies is expressly contemplated.

5. The field of regulation involved is one of local interest and concern, traditionally the subject of the reserve powers of the state.

6. State regulation in the field has been long established and is now being exercised by 41 states.

7. Congress has left no doubt of its desire to strengthen state control, and not nullify and lose for the public and the farmers the benefits of state regulation.

8. Congress has been asked to provide actual federal regulation but has not acted.

Under the principles established by this court concerning supersedure questions, the congressional intent to exclude state regulation should be "clearly manifested", not constructed out of far-fetched implications. The search should be for means of reconciling the state and federal systems, and not for the discovery of remotely possible and highly speculative conflicts. The United States Warehouse Act does not supply the character of federal legislative support necessary to the invalidation of state authority. It has not been clearly and positively demonstrated that Congress has legislated on the precise subject matters of regulation here involved, nor is there an irreconcilable conflict between state and federal authority or a plain and palpable infringement of federal policy.

III

THE MAJOR STATE REGULATORY ISSUES INVOKED

No case exists in which the United States Warehouse Act was used to invalidate state regulation of rates, service, discriminatory practices, security issues, or financial arrangements of federally licensed warehousemen. We claim and we shall here establish that as to each of the major issues of regulation presented by the Rice complaint, federal authority is completely silent. The secretary, in other words, is without the power to grant any of the relief sought or to correct any of the abuses charged.

In contrast, very specific state statutory provisions exist dealing with the precise phases of regulation involved and providing very adequate means of affirmative correction and redress of warehousing abuses. In this connection, our references will be solely to the Illinois Public Utilities Act, passed in 1913 and reenacted in 1921.[15] There is another state statute, the Illinois Grain Warehouse Act, enacted in 1871, which is similar to the United States Warehouse Act. It is significant that in the face of the Illinois Grain Warehouse Act, the Illinois legislature found it necessary to pass a second statute imposing utility regulation upon public grain warehousemen. The legislature must be presumed to have performed a useful act—and not merely to have duplicated an existing statute. Obviously, therefore, the control provided by the Illinois and federal warehouse acts is entirely different from the affirmative utility regulation expressed in the Illinois Public Utilities Act.

It is our position that all of the major issues of regulation raised in the Rice complaint are properly and validly re-

[15] Ill. Rev. Stat. 1945, Ch. 111⅔, Secs. 1-84. (Secs. 1-80 in pamphlet copy.)

served to the states. We are not here seeking "dual regulation". We are invoking the only regulatory system that now exists, Congress having remained completely silent upon the regulatory matters involved.

A. Enforce state provisions requiring prior commission approval of: (1) Contracts and arrangements with affiliates and other utilities; (2) sales, leases and encumbrances of utility properties or assets; (3) security issues.

Regulatory control has been expressly delegated to the Illinois Commission to deal with numerous financial problems of public warehouses and thus protect the public interest by the following sections of the Illinois Public Utilities Act:

Section 8a provides that no management, construction, engineering, supply, financial service or similar contract or arrangement between a public utility and an affiliated interest shall be effective unless the Commission's consent thereto is first secured.

Sections 20-26 provide for the Commission's prior approval before public utility securities maturing in over one year are issued and delegates to the Commission regulatory control over mergers, consolidations and reorganizations of public utilities.

Section 27, in part, requires prior Commission approval before two utilities may enter into operating arrangements; before a utility may transfer, lease, mortgage or sell necessary public utility property; before a utility may purchase securities of other utilities; before guaranteeing obligations of any other person or corporation; before appropriating or diverting funds to an enterprise not directly connected with the utility's business.

Such regulation has for its purpose the prevention of unwarranted drains on utility funds or the creation of onerous financial structures which would exert financial pressure upon the utility and thus affect its ability to render adequate service at reasonable rates. The warehousemen concede that no comparable authority is contained in the United States Warehouse Act.

The Circuit Court of Appeals, while recognizing this fact, held state regulation to be superseded in the following words (R. 122):

> "While we find nothing in the Act which expressly relates to such matters, we think, for the reasons already stated, that the Secretary has implied authority to deal therewith."

State authority is thus erroneously nullified, although federal regulation is completely absent and no possibility of conflict exists.

B. Fix and determine just and reasonable rates.

The warehousemen concede that Congress has not delegated authority to the secretary to establish and determine rates.[16] The Circuit Court of Appeals infers, however, that such authority has been delegated, by saying (R. 119):

> "We suppose that the essential function of a rate making body is to determine rates which will be fair both to the utility and to the public, and it appears plain

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[16]Counsel for the warehousemen contended before the Circuit Court of Appeals:

"Even though the Secretary of Agriculture may not have been specifically granted rate making powers, nevertheless State authorities are precluded from acting in this field." (Br. 19)

"The warehousemen make no claim that the Secretary of Agriculture has the power under the United States Warehouse Act to initiate, establish, and determine a rate." (Br. 42)

that the Secretary is vested with the authority to accomplish such purpose."

The federal act is devoid of any language even remotely delegating rate making powers. The importance of the function and the traditional language used for such delegations over a period of many years prevents the inference of such powers where not specifically and expressly provided.

An excellent discussion of this subject is set forth in the case of *Interstate Commerce Comm.* v. *Cincinnati etc. R. Co.*, 167 U. S. 479 (1897). In that case, the authority of the Interstate Commerce Commission to establish just and reasonable transportation rates was disputed. The federal act as it then stood required all charges to be just and reasonable; prohibited unjust and unreasonable charges; prohibited unreasonable rates and practices; made specific provision for the preparation of rate schedules and required that they be filed with the Commission and published; and authorized the Interstate Commission to "execute the provisions of this act". Despite all of this, it was decided that the commission had not been delegated the power to fix and establish rates. In summarizing its opinion, the court said (pp. 505-6):

> "Second. That Congress has transferred such a power [to fix rates] to any administrative body is not to be presumed or implied from any doubtful and uncertain language. The words and phrases efficacious to make such a delegation of power are well understood and have been frequently used, and if Congress had intended to grant such a power to the Interstate Commerce Commission it cannot be doubted that it would have used language open to no misconstruction, but clear and direct. Third. Incorporating into a statute the common-law obligation resting upon the carrier to make all its charges reasonable and just, and directing the Commission to execute and enforce the provisions of the act, does not by implication carry to the Com-

> mission or invest it with the power to exercise the legislative function of prescribing rates which shall control in the future. Fourth. * * * The grant to the Commission of the power to prescribe the form of the schedules, and to direct the place and manner of publication of joint rates, thus specifying the scope and limit of its functions in this respect, strengthens the conclusion that the power to prescribe rates or fix any tariff for the future is not among the powers granted to the Commission."

The careful language later worked out by Congress in the Hepburn Act in 1906 became a model employed by state legislatures and by future Congresses when delegating rate-making powers. So it was that in the Packers and Stockyards Act of 1921, when Congress decided to delegate rate-making powers to the Secretary of Agriculture, clear and specific language was used, coupled with a series of provisions to implement that power. (Tit. 7 U.S.C., Secs. 206-12) Under these provisions, the secretary in hundreds of cases has conducted rate hearings and established rates. The corresponding lack of such power in the same secretary to fix and determine grain warehouse rates is apparent. In the United States Warehouse Act no delegation of rate-making authority occurs, nor was such delegation intended; and it has not been shown that in the thirty years since 1916, the secretary (the same official who has been so active in rate-making as administrator of the Packers and Stockyards Act) has in a single instance sought to establish rates for federally licensed warehouses or sought to criticize or dispute the rates the warehousemen provided. The detailed and positive rate-making power in the Illinois Commission which is here sought to be nullified may be briefly summarized as follows:

> Section 32 requires that all rates or other charges made, demanded or received for any service rendered,

shall be just and reasonable. Unjust and unreasonable charges are prohibited and declared unlawful.

Section 33 requires every public utility to file with the commission a schedule showing all rates, charges and classifications of rates in force, including all rules, regulations, privileges and contracts in any manner affecting such rates.

Section 34 requires schedules to be printed, published and posted in the manner prescribed by the commission.

Section 35 prohibits any service from being undertaken unless schedules of rates are filed and published.

Section 36 prohibits any change in rates without commission approval, and sets up machinery for securing such approval and the conduct of hearings.

Section 41 then grants the commission precise and detailed power and authority to fix and determine just and reasonable rates and charges in the following language:

"Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that the rates or other charges, or classifications, or any of them, demanded, observed, charged or collected by any public utility for any service or product or commodity, or in connection therewith, including the rates or fares for excursion or commutation tickets, or that the rules, regulations, contracts, or practices, or any of them, affecting such rates or other charges, or classifications, or any of them, are unjust, unreasonable, discriminatory or preferential, or in any wise in violation of any provisions of law, or that such rates or other charges or classifications are insufficient, the Commission shall determine the just, reasonable or sufficient rates or other charges, classifications, rules, regulations, contracts or practices to be thereafter observed and in force, and shall fix the same by order as hereinafter provided."

To implement the above explicit grant of rate-making authority, the following collateral powers are delegated:

> Sections 11 to 13 authorize the Illinois Commission to establish a uniform system of accounts and to prescribe the manner in which such accounts shall be kept.
>
> Section 14 authorizes the fixing of proper and adequate depreciation rates.
>
> Section 19 provides for annual reports to the commission.
>
> Section 30 authorizes the Illinois Commission to ascertain the value of public utility property.

In addition to the aforementioned affirmative regulatory powers, the Illinois statute contains many procedural sections which serve to make regulation effective and at the same time provide safeguards of fair play and due process.

> Sections 64 to 69[17] provide for the conduct of hearings and investigations, administration of oaths, issuance of subpoenas and the immunity of witnesses. After hearings, provision is made for the entry of orders based upon and supported by findings of fact.
>
> Sections 70 to 75 provide for service of orders, rehearings, modifications of orders, and judicial review.
>
> Section 76 provides for reparation awards when excessive or unjustly discriminatory rates are charged.
>
> Sections 77 to 84 provide for the enforcement of provisions of the statutes by mandamus or injunction proceedings, or the assessment and recovery of penalties by the commission, or cancellation of licenses.

It is urged that this elaborate and comprehensive state regulatory system with respect to rate-making be invali-

[17] The sections of the Illinois Public Utilities Act referred to in this and the succeeding three paragraphs appear in the pamphlet edition furnished to the court as sections 60-65; 66-71; 72; and 73-80, respectively. In this instance only is there any variance between the section numbers of the Revised Statute and the pamphlet copy.

dated as in conflict with Section 25 of the United States Warehouse Act and regulations issued thereunder. That section provides that:

> "The Secretary * * * may, after opportunity for hearing * * * suspend or revoke any license to any warehouseman * * * for any violation of or failure to comply with any provisions of this Act or of the rules and regulations made hereunder, or upon the ground that unreasonable or exorbitant charges have been made for services rendered."

The regulations require the licensed warehouseman to file a copy of his rates and proposed changes with the department, and to post his current rates in his principal office. (Reg. 5, Sec. 3)

There is no statutory requirement that rates be filed, or statutory prohibition against charging a lesser or a greater rate than that filed, or statutory requirement that prior notice be given before changes are made. Neither the federal act nor regulations thereunder in any way prevent a licensed warehouseman from filing any form or type of rate as long as it is not exorbitant.

The acceptance of a rate schedule for filing by the secretary does not constitute approval of such rates or establish their reasonableness. *Interstate Commerce Comm. v. Cincinnati, etc. R. Co.*, 167 U. S. 479 (1897); *Cleveland v. Hope Natural Gas Co.*, 44 P.U.R. (n.s.) 1, 33 (F.P.C. 1942). No conflict with the existing positive state rate-making powers exists. The secretary may revoke a license because an exorbitant rate was charged in the past. The secretary cannot determine and prescribe what will constitute a reasonable rate for the future. In fact, the secretary is entirely without any affirmative powers. He is not authorized to issue any order or directive under any circumstances, except that he may revoke a voluntary license. He has no

"veto power". If a license is revoked, the warehouseman is still free, so far as federal authority is concerned, to conduct his business and charge whatever rate he chooses. No federal penalties are provided. The secretary can only take back his voluntary and permissive license.

But what if the state, acting pursuant to the Rice complaint, reduced storage rates? The federal regulation—not the statute—requires storage rates and changes therein to be filed. There is no conflict. The warehousemen can freely comply with the federal regulation by performing the purely ministerial function of filing the newly prescribed rate with both the federal and state agencies. The secretary has no function to perform except to receive the rates and file them. Full compliance with both controls may thus be readily achieved.

It is unreasonable to assume, as the Circuit Court of Appeals does (R. 119), that the Illinois Commission might "determine a rate higher than that determined by the Secretary to be not unreasonable or exorbitant". This assumed condition could arise only where the Illinois Commission prescribed an exact rate and thereafter the secretary, in a license revocation proceeding, found the prescribed rate to be exorbitant. The prospect of such a series of events occurring is highly unlikely and improbable. Conflict is sought to be constructed on the basis of remote and speculative possibilities.

The prayer in this proceeding is for a reduced rate. Respondents are contesting state jurisdiction here, not because they fear the state will order them to charge higher rates, but because they anticipate that a lower level of rates will be prescribed. The Illinois Commission is under a statutory duty to fix "just and reasonable" rates, and it must be presumed that the commission will validly perform its functions and will not prescribe exorbitant rates.

The assumption of the Circuit Court of Appeals contemplates that the state, with its elaborate statutory machinery and expert utility regulatory staff, would not fix just and reasonable rates; moreover, it assumes that the secretary would do so, even though he has never regulated rates, and is neither equipped nor authorized by statute to perform such a function.

We have alleged and are prepared to show frequent departures from filed rates, issuance of rebates and consummation of special deals. Respondents have failed to show that the secretary in all his tenure under the United States Warehouse Act has, in a single instance, even faintly questioned a charge on the ground of its being exorbitant, unreasonable or discriminatory.

Since the absence of federal power to fix, establish or determine warehouse rates is conceded, and since state rate-making powers do not conflict with the provisions or objectives of the United States Warehouse Act, it is clear that the state authority is permissible and valid, and should not be nullified.

C. Enforce the state constitutional provision against occupying the dual and conflicting positions of public grain warehouseman and, at the same time, grain dealer.

Public warehousemen, when in competition with their storage customers, have practiced innumerable forms of discrimination and self-preference. In Illinois a separate article was written into the state constitution dealing solely with public warehouses. These provisions were interpreted in *Hannah* v. *People*, 198 Ill. 77, 64 N.E. 776 (1902) as prohibiting the vice of a quasi-public institution acting in a dual and conflicting capacity with its customers. The prohibition was imposed to protect the interests of farm-

ers, grain receivers and shippers. We have sought to have the Illinois Commission enforce this wise policy.

Respondents urge that federally licensed warehousemen are authorized to deal in grain by Section 18(i) of the federal act, and therefore the state prohibition has been superseded. Section 18 specifies information which warehouse receipts must contain. Subparagraph (i) provides:

> "That every receipt issued • • • under this Act shall embody within its written or printed terms • • •
>
> "(i) if the receipt be issued for agricultural products of which the warehouseman is owner, either solely or jointly or in common with others, the fact of such ownership; • • •."

This provision contains no prohibition against warehousemen dealing in their own grain, but neither does it authorize or approve such practice. It would appear that the fact of ownership of grain by warehousemen was considered a *suspicious circumstance*, or of such a doubtful character as to necessitate its disclosure on the receipt for the protection of the receipt holder.

No direct and positive federal approval exists to raise an irreconcilable conflict with the state prohibition.

In *Dickson* v. *Uhlmann Grain Co.*, 288 U. S. 188 (1933), the court considered the Grain Futures Act which sanctioned futures trading by setting up specific requirements under which such trading could be conducted. The state of Missouri, however, declared illegal certain grain futures transactions. This state prohibition was upheld in the face of claimed supersession by federal law.

Similarly, in *Minnesota ex rel Whipple* v. *Martinson*, 256 U. S. 41 (1921), the Federal Anti-Narcotics Act expressly permitted physicians personally to dispense drugs to any person, provided records were kept. The state law pro-

hibited a physician from furnishing drugs to habitual users out of his own stocks. The state prohibition was upheld as not creating a substantial conflict with the federal enactment.

The United States Warehouse Act does not sanction what the state prohibits even to the extent involved in the above cases. The state prohibition against duality of capacity is not in conflict with any federal requirement.

The Circuit Court of Appeals was influenced in its decision on this point by the belief that:

> "To sustain defendants' contention on this point would immediately invalidate receipts of the value of millions of dollars." (R. 120)

The relief sought from the Illinois Commission is an order against public warehousemen prohibiting them from thereafter dealing in grain. The order could only act prospectively, and then only upon the warehousemen themselves and not the receipt holders. Past violations could not even be punished by the assessment of penalties. Only violations occurring after the entry of a prohibitory order may be punished—but even then, innocent third party receipt-holders would not be affected.

D. Eliminate discriminatory rates and practices.

Discriminatory rates and practices of a serious, unethical and unbusinesslike character are sought to be prevented. The complaint before the Illinois Commission charges that the respondent warehousemen maintain a grossly discriminatory and unwarranted difference in storage rates in favor of the federal government, as against public grain dealers. In addition it is charged that warehousemen in their dual and conflicting position as grain dealers and public warehousemen have been able to effect undue pref-

erences and advantages *for themselves* and in discrimination against public dealers by:

a) mixing grain;

b) manipulating and rebating storage charges;

c) withholding desirable transit tonnage for themselves;

d) utilizing storage space which is preferable from an insurance standpoint;

e) delaying loading of grain in furtherance of their own interests.

The Illinois Commission is fully equipped and legislatively empowered to deal with these issues under the following sections of the Illinois Public Utilities Act:

Section 37—No public utility shall "refund or remit directly or indirectly, in any manner or by any device, any portion of the rates or other charges".

Section 38—

"No public utility shall, as to rates or other charges, services, facilities or in other respect, make or grant any preference or advantage to any corporation or person *or subject any corporation or person to any prejudice or disadvantage.* No public utility shall establish or maintain any unreasonable difference as to rates or other charges, services, facilities, or in any other respect, either as between localities or as between classes of service."

The commission is expressly authorized to eliminate such discriminations by fixing and determining just, reasonable and sufficient rates and practices by the issuance of orders based upon findings of fact after full and complete hearings. (See *supra* pp. 55-7)

The warehousemen rely almost entirely upon Section 13 of the United States Warehouse Act to nullify this express affirmative state regulation. The section reads:

> "That every warehouseman conducting a warehouse licensed under this Act shall *receive* for storage therein, so far as its capacity permits, any agricultural product of the kind customarily stored therein by him *which may be tendered* to him in a suitable condition for warehousing, in the usual manner in the ordinary and usual course of business, without making any discrimination between *persons desiring to avail themselves of warehouse facilities.*"

Obviously only one federal requirement is imposed, and that is that the warehousemen accept grain for storage if space exists, without discriminating between those who want storage space. The word "receive" is the only word of command, and "discrimination" refers only to an unfair refusal to store grain tendered. All other forms of discrimination are left untouched. The provision has absolutely no relationship to discriminatory rates, nor to the self-preferences realized by warehousemen as against public dealers *after* the latter become customers and storers of grain in such warehouses.

In any event, concededly the secretary is not granted the affirmative authority to eliminate any form of discrimination. He cannot fix and determine rates or practices that are fair and non-discriminatory. No conflict between the two systems exists. The secretary's acquiescence in the existence of discriminatory rates and practices, if he knew of such conditions, does not serve to supersede affirmative state regulation, but emphasizes the lack of authority in the secretary to deal with such matters.

E. Establish safe, proper, adequate and efficient grain warehousing service and facilities.

The Illinois act in Sections 32 and 49, by careful and detailed language delegates specific affirmative authority to the commission to compel the establishment by public utilities, including grain warehousemen, of safe, proper, adequate and efficient services and facilities, and to adjust and augment such services and facilities wherever the public interest requires.

Section 50 authorizes the commission after hearings to direct utilities to make additions, repairs and improvements to promote the security or convenience of employees or the public or to secure adequate service.

It is urged that supersedure results from the terms of Section 3 of the United States Warehouse Act which grant to the secretary the right to determine whether the warehouse for which a voluntary license is sought is "suitable" for the proper storage of agricultural products.

The meaning of the word "suitable" in Section 3 is clarified in Section 4. The secretary is required to ascertain that the warehouse for which a license is issued is "*suitable for the proper storage of the particular agricultural product" for which an application for license is made.* In other words, the secretary, under the federal act, administers warehouses for cotton, grain, tobacco, flaxseed and other agricultural products. He must determine that the particular warehouse is fitted for the storage of grain, rather than the storage of cotton, or for tobacco rather than flaxseed. The federal act does not deal with the adequacy of warehousing service and facilities or the power to require improvements thereof.

A similar issue involving far greater federal power was presented to this court in *Atchison, T. & S. F. R. Co.* v.

Railroad Commission, 283 U.S. 380 (1931). There, the City of Los Angeles sought to compel railroads to construct a union terminal. When proceedings to that effect were initiated before the Interstate Commerce Commission, that body held that it was without authority to *compel* the construction of the terminal. Upon appeal to this court, that position was sustained. Proceedings were then initiated before the state commission, and this court held that the state could not require the construction of the station and the relocation of connecting tracks without the *approval* of the Interstate Commission. The issue was thus stated by the court (p. 390):

> "This court has held that the State Commission could not require the construction of the proposed station, and the relocation of connecting tracks, *without the approval of the Interstate Commerce Commission.* That approval has been given. This court has also decided that the Interstate Commerce Commission has not been empowered to *require* the building of the station."

In other words, a sharp distinction was made between the power of the commission to require or compel the improvement of service through the construction of a union terminal, and the necessity for commission approval before such a terminal project was instituted. It was claimed that the state authority to compel construction was in conflict with, and therefore superseded by, the federal requirement of prior commission approval. This position the court flatly rejected in the following language (pp. 392-3):

> "The considerations which led the court to the conclusion that the power to *compel* the construction of such terminals had been withheld from the Federal Commission also make it clear that the authority which resided in the state had not been taken away except to the extent that the *approval* of the Federal Commission was required. The principle thus applicable

> has been frequently stated. It is that the Congress may circumscribe its regulation and occupy a limited field, and that the intention to supersede the exercise by the state of its authority as to matters not covered by the Federal legislation is not to be implied unless the act of Congress fairly interpreted is in conflict with the law of the state."

The distinction between the regulatory authority to approve a facility as against the authority to compel the correction of existing conditions was thus sharply drawn in the *Atchison* case, and is of conclusive applicability to the instant proceeding. No reference is made or can be made to any provision in the United States Warehouse Act which empowers the secretary to compel a licensee to correct or improve or change his services and facilities in the interest of adequacy and safety of service. It is only urged that the existing warehouses have been approved. This limited federal function, even if it exists as claimed, is not in conflict with the affirmative authority granted the state commissions to *order and direct* safe, adequate, proper and improved services.

It is also contended that federal power is found in the authorization to the secretary by Section 3:

> "• • • to prescribe, within the limitations of this Act, the duties of the warehousemen • • • with respect to their care of and responsibility for agricultural products stored therein."

This delegation is clearly limited to further the integrity of warehouse receipts, and not to prescribe standards of service and improvements of facilities.

Sections 23 and 24, cited by the court below, have no bearing upon the instant regulatory problem.

Here again no conflict exists.

F. Prevent unwarranted abandonment of public grain warehouse service and capacity.

The Illinois provision on this subject is clear and unequivocal. The statute reads:

> "§49a. No public utility shall abandon or discontinue any service without first having secured the approval of the Commission. In granting its approval, the Commission may impose such terms, conditions or requirements as in its judgment are necessary to protect the public interest. * * *"

An application to the state commission must be made and approval secured before utility services may be abandoned. No state authority exists to compel abandonment. While no federal control on this issue exists, the warehousemen urge that the secretary's power to suspend or revoke a license requires state supersedure. The Circuit Court of Appeals holds that where a federal warehouseman desires to abandon his service, "he could only do so by satisfying the bond and surrendering his license", then "control would revert to the state". (R. 122) In other words, if a warehouse is abandoned, a license is revoked or suspended and then state control takes hold. But the warehouse service is gone—there is nothing and nobody to regulate. The public's interest in the maintenance of adequate public grain warehousing service is irreparably prejudiced.

The federal act contains no provisions comparable to, and certainly none which conflicts with the invoked state authority.

CONCLUSION

We respectfully submit that respondents have completely failed to demonstrate the existence of any federal authority over the precise subjects of regulation invoked before the Illinois Commission. They have shown no actual and positive irreconcilable conflict and repugnance between the state rules and the federal provisions and purpose. Speculative and fancied conflicts will not support the urged supersedure of comprehensive affirmative state regulation in a local field traditionally reserved to the states. The limited and circumscribed control offered by the United States Warehouse Act, which is in the nature of a warehouse receipt act, and under which the acquisition of a license is permissive and voluntary, is not a substitute for affirmative regulatory action. The secretary is without authority to grant any of the relief sought before the Illinois Commission. *There is no question of exposure to dual regulation or penalties.*

To nullify state statutory and constitutional provisions under such circumstances would be to grant the warehousemen complete immunity and freedom from effective regulation, to the distinct detriment of the public. Congress could not have intended to nullify state legislation affecting matters of the public welfare without providing definite federal regulation in lieu thereof. The invalidation of state regulatory authority in this case would not serve to transfer that authority to the federal government.

As this court said in *Penn Dairies* v. *Milk Control Com.*, 318 U. S. 261, 275 (1943):

> "* * * we should be slow to strike down legislation which the state concededly had power to enact, because of its asserted burden on the federal government. For the state is powerless to remove the ill effects of our decision, while the national government, which has the ultimate power, remains free to remove the burden."

The order of the District Court properly denied injunctive relief, and should be sustained, and the order of the Circuit Court of Appeals for the Seventh Circuit should be reversed.

Respectfully submitted,

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